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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 702

SAM McINTYRE,

Petitioner,

vs.

STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

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Petition.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Sam McIntyre, respectfully shows:

That on the 23rd day of February, 1940, an indictment was returned against him by the Grand Jury of Fulton County, Georgia, charging and accusing him with the offense of misdemeanor: "for that said accused, in the County of Fulton and State of Georgia, on the 17th day of February 1940 with force and arms did keep, maintain and operate a lottery, known as the number game, for the hazarding of money, contrary to the laws of said State, the good order,

peace and dignity thereof," which said indictment was transferred to the Criminal Court of Fulton County for trial without notice to petitioner.

That on the 22nd day of March, 1940, the cause entitled *State of Georgia* v. *Sam McIntyre* came on to be tried in the Criminal Court of Fulton County.

That upon the call of the case, and before arraignment and pleading to said cause, in the Criminal Court of Fulton County petitioner filed a Special Plea setting out in detail facts which discriminate against him arbitrarily and unjustly, and deny petitioner due process of law and equal protection under the 14th Amendment to the Constitution of the United States and attacking the validity of the statutes which provide for trials of misdemeanors by said court. The Special Pleas was overruled by said court, and petitioner ordered to proceed to trial in the Criminal Court of Fulton County.

The certain evidence introduced upon the trial of the petitioner was objected to and a proper and timely motion to exclude and rule out from the consideration of the jury said evidence on the ground that it was obtained by an unreasonable, illegal and unauthorized search and seizure in contravention and violation of certain provisions of the Constitution of the State of Georgia, hereinafter set out thus violating certain provisions of the Constitution of the United States hereinafter set out. Said objections were overruled by the trial court, and the evidence admitted. Petitioner was found guilty of the offense charged, and sentenced to serve twelve (12) months on the public works.

On the 20th day of April, 1940, a timely appropriate petition for the writ of certiorari was presented to Fulton Superior Court, in accordance with the rules of practice and procedure in such cases, and on the same day an order refusing to sanction said petition and denying petitioner's appeal was entered by said Fulton Superior Court. To

this order petitioner then and there duly and properly excepted and assigned the same as error. Within the time prescribed by law, a certified Bill of Exceptions was presented to the Supreme Court of Georgia in which the nature of said cause and the errors complained of were plainly, fully and distinctly set out, to which was attached all material necessary to a clear understanding of the cause, together with the Petition for Writ of Certiorari and the Order refusing to sanction the same.

After argument, the Supreme Court of Georgia on September 24th, 1940, affirmed the Order refusing to sanction petitioner's Writ of Certiorari, and in so doing, passed upon the constitutional questions raised by the petitioner in the original court (— Ga. —).

A Motion for Rehearing was filed by petitioner within the time prescribed by law and said Motion was denied on October 16th 1940.

The Supreme Court of Georgia has thus established law in the State of Georgia which has deprived petitioner of rights and privileges guaranteed him under the Constitution of the State of Georgia and under the Constitution of the United States, as will be more fully hereinafter set out.

Part I.

Petitioner has been denied by the State of Georgia equal protection and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that he has been arbitrarily and unjustly discriminated against in the following manner, to-wit:

1. The indictment against petitioner was transferred to the Criminal Court of Fulton County without the knowledge or consent of petitioner, and at petitioner's first opportunity, objection was made by a written plea in abatement (R. 2), which was overruled and denied by the trial court (R. 13).

2. Petitioner, over his timely objection, and as a result of the capricious whim of the officials of the courts, was tried in the Criminal Court of Fulton County, while others similarly situated and in like circumstances are provided trial in Fulton Superior Court; the said trial of petitioner is an arbitrary and unjust discrimination between him and others similarly situated and is a denial of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States for that:

(a) The Criminal Court of Fulton County, created by statutes, the validity of which is herein challenged, has concurrent jurisdiction with Fulton Superior Court in the trial of misdemeanors, but trials in said Criminal Court are discriminatory against petitioner as will hereinafter appear:

(b) Trials in said Superior Court are had before a jury of twelve (12) selected from a panel of twenty-four (24) tales jurors, from which the accused has seven (7) peremptory strikes and the State five (5); whereas in the Criminal Court trials are had before a jury of five (5) selected from a panel of twelve (12) tales jurors, from which the accused has four (4) peremptory strikes and the State three (3);

(c) The unanimous verdict of twelve (12) jurors is required for conviction in the said Superior Court, while the unanimous verdict of only five (5) jurors is required for conviction in the said Criminal Court of Fulton County;

(d) In the event of conviction in the said Superior Court a new trial may be obtained on newly discovered evidence, whereas in the said Criminal Court one is precluded by law from seeking or obtaining a new trial upon that ground;

(e) The right to a Motion for Change of Venue to obtain an impartial jury is provided in the said Superior Court,

whereas such right is denied in the said Criminal Court, by law.

(f) Appeal from conviction in the said Superior Court is directly by Bill of Exceptions to the proper Appellate Court, whereas in the said Criminal Court the more involved and expensive method of appeal is by writ of certiorari through the Superior Court and thence to the appellate Court;

(g) Selection of the court in which one accused is tried, *i. e.,* Criminal Court of Fulton County or Fulton Superior Court, is left entirely to the capricious whim of the officials of the courts;

(h) Even if the statutes hereinafter challenged were valid, which petitioner denies, the protection therein provided has been denied to petitioner inasmuch as the provision for transfer to said Criminal Court from said Superior Court states in part: "* * * that whenever a prosecution may be commenced in the Superior Court of Fulton County * * *, the same may be transferred to and tried in the City Court of Atlanta (now Criminal Court of Fulton County) *at the discretion of the presiding Judge of said Superior Court,* * * *." The prosecution in the instant cause was not transferred "at the discretion of the presiding Judge of said Superior Court," but was transferred at the capricious whim of the Solicitor General.

(i) Section 15 of the Act of September 6, 1891 (Acts 1891, pp. 935, *et seq.* Vol. II) conferring jurisdiction upon the Criminal Court of Atlanta (Act of Feb. 23, 1935, changed name to Criminal Court of Fulton County) to try misdemeanors, which adopted the provisions of the Act of 1871 (Acts 1871, p. 57) and the Act of 1876 (Acts 1876, p. 96), which gave jurisdiction to the City Court of Atlanta to try misdemeanors in Fulton County, amended by Sec-

tion 1 of said Act of February 23, 1935, providing that said court should have jurisdiction over the County of Fulton of the following matters, viz., "all crimies and offenses which by the Constitution of the State are not exclusively cognizable in the Superior Courts thereof, insofar as the same relates to misdemeanors alleged to have been committed in Fulton County," is unconstitutional and void, being repugnant to and violative of the Fourteenth Amendment to the Constitution of the United States for that it discriminates between petitioner and others in like circumstances and similarly situated.

(j) That portion of Section 11 of said Act of 1891 (Vol. II, Acts 1890-91, p. 397) which provided that "the jury in said Court shall consist of five (5), to be stricken alternatively by the defendant shall be entitled to four (4) strikes and the State three (3), and the remaining five (5) jurors shall compose the jury," is unconstitutional and void, being repugnant to and violative of the Fourteenth Amendment to the Constitution of the United States for that it discriminates between petitioner and others in like circumstances and similarly situated.

(k) Section 16 of said Act of 1891, creating the Criminal Court of Atlanta, which adopted the provisions of Section 1 of the Act of February 21, 1873 (Acts 1873, p. 119) providing "that whenever a prosecution may be commenced in the Superior Court of Fulton County against any person or persons charged with the commission of an offense in the City of Atlanta, not punishable by death or imprisonment in the penitentiary, the same may be tried in said City Court upon indictment found in said Superior Court, and the Clerk of said Superior Court shall transfer all papers in the cause to the said City Court" is unconstitutional and void, being repugnant to and violative of the Fourteenth Amendment to the Constitution of the United

States for that it discriminates between petitioner and others in like circumstances and similarly situated.

2. The question of unjust and arbitrary discrimination between petitioner and others similarly situated, as hereinbefore set out, was properly raised in the trial court (R. 2), and the question was again properly presented in the petition of certiorari to Superior Court (R. 2), and was properly presented to, and was passed upon by the Supreme Court of Georgia (R. 24). It is now properly before this Honorable Court.

3. The validity of the statutes hereinbefore referred to was drawn in question and was presented to the trial court in the written plea in abatement (R. 3), the exception preserved and presented on certiorari to the Superior Court (R. 1), and by that court passed upon (R. 23), and thereafter properly preserved, and presented to and subsequently passed upon by the Supreme Court of Georgia (R. 24), and now is properly before this Honorable Court for final determination.

Part II.

Petitioner has been and is being deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States for that:

1. The sole evidence adduced upon the trial of petitioner was obtained by an unreasonable search and seizure, without a warrant, and while petitioner was neither under legal arrest nor violating any law in the presence of the searching officers, albeit Article 1, Section 1, Paragraph XVI of the Constitution of the State of Georgia provided:

> "The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable search and seizures, shall not be violated; and no

warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

2. Timely objection was made in the trial court to the introduction and admission of the evidence obtained by said unreasonable search and seizure, which said objection was overruled (R. 17). Said evidence objection being as follows:

"At the time I saw McIntyre he was talking to Smith. I did not have a warrant for his arrest. He was not committing any crime in my presence. We did not have a search warrant for him, but we held him and searched him and found that book but don't remember which pocket it was in * * *. He objected to our searching him * * *. From my knowledge of the lottery I would say that those things in that book which would indicate it was used in the lottery operation."

"We object to the introduction of these articles in evidence and to the testimony based thereon on the ground that they were taken from the person of this defendant forcibly and against his will in violation of the Constitution of Georgia, Article 1, section 1, paragraph 16, to-wit, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

We object further on the ground that this evidence was obtained in violation of the constitution of Georgia as contained in article 1, section 1, paragraph 6, to-wit: "No person shall be compelled to give testimony tending in any manner to criminate himself."

In that this defendant was compelled to submit while his person was searched, in violation of the provisions

of this section of the constitution and as a result of this evidence being so forcibly obtained in violation of the constitution of Georgia, defendant is without adequate and complete remedy of law unless this evidence is stricken from the record and not admitted for the consideration of the jury, and that the admission in evidence of these documents obtained in violation of the State constitutional guarantees, denies this defendant due process of law and the equal protection of the 14th amendment to the constitution of the United States, in that this defendant is by the Constitution of Georgia guaranteed these rights under said constitution, but if this evidence is admitted he is without means of securing the benefits of these constitutional guarantees, the effect of which is to deny him due process of law under the 14th amendment to the constitution of the United States, and on the further ground that the defendant's rights under these constitutional provisions were denied him by two or more officers of the State of Georgia, acting in concert violation of the civil right act of the United States as contained in title 8, section 47, sub-paragraph B, of the United States Code Ann."

Which said objection the court overruled and permitted the documentary evidence to be introduced, and the oral testimony to remain for the consideration of the jury.

3. Admission of the evidence obtained by said unreasonable, unconstitutional, illegal and unauthorized search and seizure and the testimony pertaining thereto, being highly prejudicial, and admitted over the timely objections of petitioner, has deprived petitioner of the benefits, rights and privileges guaranteed by Article 1, Section 1, Paragraph III, of the Constitution of the State of Georgia to-wit: "No person shall be deprived of life, liberty or property, except by due process of law." The effect of which is to deprive him of his liberty without due process of law

in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The admission of evidence obtained by said unreasonable search and seizure has compelled petitioner to give testimony which tends to criminate him, albeit Article 1, Section 1, Paragraph VI of the Constitution of the State of Georgia provided:

> "No person shall be compelled to give testimony tending in any manner to criminate himself."

5. Deprivation of the rights and privileges guaranteed to petitioner by the Constitution of the State of Georgia is a denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

6. All of the objections based on said constitutional grounds were properly made to the introduction and admission of said evidence in the trial court, and said objections were overruled, and exception was properly preserved and presented to the Superior Court in the petition for certiorari (R. 16), and thereafter presented to and passed upon by the Supreme Court of Georgia (R. 24), and it is properly before this Honorable Court for final determination.

Two substantial Federal questions are presented in this Petition and they are before this Court for review.

WHEREFORE, petitioner prays that an Order granting this Petition for Writ of Certiorari be entered, notifying the Supreme Court of Georgia of the granting of the petition, and that the certified transcript of all proceedings of the said Supreme Court in the cause entitled Sam McIntyre *v.* State of Georgia, No. 13399 transmitted herewith be treated as though sent up in response to a formal Writ, to the end that the said cause may be reviewed and deter-

mined by this Court as provided in 28 U. S. C. 344 (b); that said judgment of the Supreme Court of Georgia in said case may be reversed by this Court, and that petitioner may have such other and further relief or remedy in the premises as this Honorable Court may deem appropriate.

Respectfully submitted,

SAM MCINTYRE,

By GEORGE G. FINCH, G. SEALS AIKEN,

His Attorneys.